Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2032

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Local 399, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter Local 399) prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, appears as Appendix A of this Petition. The Court of Appeals originally issued its opinion in an unpublished order form on April 17, 1974, but at the request of the National Labor Relations Board ordered, on June 24, 1974, that the previously unpublished order be reissued as a printed opinion and that it will be citable as precedent henceforth. (Copy of Court Order attached as Appendix B)

The Decision and Order of the National Labor Relations Board (hereinafter called Labor Board) is reported at 200 NLRB No. 157. The opinion plus the administrative law judge's decision (under title Trial Examiner's Decision) is attached as Appendix C.

JURISDICTION

The original unpublished order of the Court of Appeals was issued April 17, 1974. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. When a Union's Constitution provides for continued membership, may an employee, who voluntarily joined that Union, and who failed to submit a written resignation to the Union, be absolved from his maintenance of membership obligation to resume payment of union dues upon his return to a craftsman's job, solely because he had worked as a foreman for the same employer.

2. Whether the Court of Appeals properly found that Local 399 violated Section 8(b)(1)(A) and 8(b)(2), by its requesting an employer to terminate an employee under the provisions of an existing collective bargaining agreement, for failure to tender dues from the date of his return from a foreman's job to a craftsman's job, and thereby give the employee a second option to join the Union under the collective bargaining agreement's maintenance of membership provision.

STATUTES INVOLVED

The Labor Management Relations Act (LMRA), 29 USC § 151 et seq. in it Section 8(b)(1)(A) and Section 8(b)(2) are applicable to this case. Those sections read as follows:

> (b) It shall be an unfair labor practice for labor organization or its agents—
>
> (1) to restrain or coerce
>
> (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to proscribe its own rule with respect to the acquisition or retention of membership therein;
>
> * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Unfair labor practices charges alleging a violation of Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act were filed by Illinois Bell Telephone Company (hereinafter Bell) on March 22, 1971. The National Labor Relations Board (hereinafter Labor Board) through its Peoria Office, dismissed the charges on April 2, 1971. Thereafter Bell filed an appeal of the dismissal with the General Counsel of the Labor Board. That appeal was denied on July 27, 1971.

Bell filed, on August 5, 1971, a request for reconsideration by the General Counsel, of his affirmance of the dismissal. Thereafter, a newly appointed General Counsel granted the request for reconsideration and reversed the dismissal of the charge on February 15, 1972.

Complaint was issued on March 1, 1972, alleging violations of Section 8(b)(1)(A) and 8(b)(2) and a hearing was held by the Labor Board on April 25, 1972.

At the hearing the parties entered into a stipulation of facts as follows:

> "(1) Robert Galka was hired on September 1, 1959 by Illinois Bell Telephone Company as a frame man at Decatur, Illinois. He joined Respondent Union in March, 1960.
>
> "(2) On March 15, 1968, Robert Galka, who was then a communications maintenance man, was appointed to a supervisory position as a station installation foreman with Illinois Bell Telephone Company in Decatur, Illinois, which position was outside the collective bargaining unit represented by Respondent.
>
> "(3) On February 1, 1969, Robert Galka, at his own request, returned to the job of communications maintenance man which was within the collective bargaining unit repre-

sented by Respondent, which he was in prior to his promotion out of the bargaining unit.

"(4) Following his assumption of the duties of communications maintenance man, Robert Galka did not resume payment of his dues."

Introduced at the Labor Board hearing were copies of relevant sections of the Constitution of the International Brotherhood of Electrical Workers, which provided for the oath of allegiance to the Union upon joining, and the retention of membership upon acquiring supervisory status. (Copies of relevant sections are attached as Appendix D)

At the Labor Board hearing the employee, Galka, admitted that he made no attempt to submit a written resignation to Local 399 or the International Union, at any time.

Also introduced at the Labor Board hearing were copies of relevant sections of the collective bargaining agreement in effect during the times material thereto. (Copies attached as Appendix E)

The employee, Galka, admitted that he retained all the fringe benefits provided by the collective bargaining agreement from the beginning of his employment with the company, which included his time as a foreman.

Local 399 union agents made requests for the resumption of dues payments of Galka at various times during 1969 and the first half of 1970.

On July 1, 1970, Local 399 sent a letter to Bell requesting Galka's termination because of his refusal to make arrangements to pay for dues owed from the date of his return to the collective bargaining unit. Bell responded by letter of July 30, declining the Union's request. In September, 1970, unfair labor practice charges were filed with the Peoria office of the Labor Board by both Local 399 and Bell. Both charges were subsequently withdrawn at the request of the Peoria office of the Labor Board. On September 24, 1970, a second letter was sent

by Local 399 to Bell requesting Galka's termination for failure to tender union dues. Bell again refused to comply with the union's request.

On December 3, 1970, Local 399's attorney wrote a letter to Galka advising him that appropriate action would be taken on behalf of that Union, if he did not satisfy his dues arrearage. Shortly thereafter Galka paid Local 399 the amount of dues owed and signed a check-off authorization card for the deduction of dues.

The Labor Board, from the recommended decision of its Administrative Law Judge, decided that the employee ended his obligation to resume dues payments because of his having worked in a foreman capacity. The decision was based primarily upon the Labor Board's 1948 decision in a case called *Idarado Mining*, 77 NLRB 392, which concluded that an employee obtained the status of a new employee upon return to the craftsman's job and thus had a second option to join the union. The decision of the Seventh Circuit Court of Appeals substantially affirmed the findings of the Labor Board in all relevant respects.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH A DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS

The primary question decided by the Seventh Circuit concerns continued employee status of Galka in so far as the application of the maintenance of membership, union security clause is concerned, upon his return to the craftsmen's job, in light of the ability of the union to prescribe its own valid internal rules for retention of membership under the § 8(b)(1)(A) proviso.

The instant case is the second case in the Labor Board's recent attempt to revive a decision issued in 1948 known as the *Idarado Mining Company* case, 77 NLRB 392. The essence of the Board's decision in the *Idarado Mining* case was that, when an employee leaves a bargaining unit and subsequently returns to work within that bargaining unit, he is to be considered as a new employee and thus to be given a second option to join the union under a maintenance of membership contract. Following the Labor Board decision in 1948 there was a retreat from the application of the theory of that case so that it became dormant for many years.[1]

In 1972, however, the Labor Board in a decision issued in a case commonly known as *Cavalier Industries, Inc.* attempt to revive this theory by applying it to a situation where the employee returned to work after a severance of employment. *Industrial Towel and Uniform Service, A Division of Cavalier Industries, Inc.*, 195 NLRB No. 187. The Board specifically

1. It is mentioned in only one Labor Board decision, 149 NLRB 1573 (1969), between 1959 and 1971, and then as a footnote along with other cases.

referred to the *Idarado Mining* decision and used that case as the basis for finding violations of Section 8(a)(3) by the Employer and of Section 8(b)(2) by the Union involved. The language of the Board in this regard is as follows:

> "The sole remaining question is whether the severance of the relationship vitiated the checkoff authorization which had been executed in Durham's previous period of employment. In *Idarado Mining Company*, an employee had joined a union during his first period of employment under a maintenance-of-membership contract. After quitting his job he returned to work and the union insisted that he pay dues pursuant to his becoming a union member during the first period of employment. The Board found that the severing of the employment relationship also severed the employee's obligation to remain a member and that he had the status of a new employee who would assume the obligation of membership only if he voluntarily rejoined the union. By analogy we think that the severing of the employment relationship severed Durham's obligation under the checkoff authorization and that her obligation would not be revived until she had signed a new authorization. (footnotes omitted)

When the Labor Board sought enforcement of the *Cavalier* case, the Sixth Circuit Court of Appeals denied the Board's application. Although not specifically mentioning the *Idarado Mining* case by name, the Court rejected the Board's view of the new employee status, and specifically rejected that conclusion in the following language.

> Secondly, the circumstances, as found by the Trial Examiner, surrounding the re-employment of Durham in 1969 indicated that neither the company nor the union treated her resumption of employment as an initial employment. In addition, we cannot say that the Board's finding that she had no reasonable expectancy of re-employment at that time is supported by substantial evidence. Durham did not testify as to any information imparted by her to the company at the time of her departure in 1966, nor to any information imparted to her as to the expected duration of her layoff. The fact that she was not charged an initiation

> fee by the union also indicates that the union regarded her as a member in good standing returning to work. The substantial evidence indicates that Durham was not hired in 1969 as a new employee. (473 F. 2d 1258 at page 1260.)

After rejecting the Labor Board conclusion that the Union member should be considered as a new employee with a second option to join the Union, that Court went on to decide the effect of the members' failure to attempt to revoke the dues checkoff authorization. In that regard the Court said as follows:

> Absent any evidence that the company continued to deduct dues after a valid revocation of the authorization, we cannot find that the company violated the Act. Since Durham did not sever her employment relationship and since no revocation of the checkoff authorization form was attempted, the authorization continued to be valid, and there was no unfair labor practice by the company in deducting the union dues from the pay of the charging party. It follows, of course, that no unfair labor practice was committed by the union. (473 F. 2d 1258 at page 1261.)

The facts of the *Cavalier* case regarding the employee are substantially the same as the employee conduct in the instant case, except that here the employee did not even leave the company's employment or the coverage of the collective bargaining agreement's seniority and fringe benefit provisions. However, the Circuit courts reached contrary conclusions as to the dues obligation of the employee-member.

Since the Sixth Circuit effectively overruled the Board's reliance upon the rationale of the *Idarado Mining* case, Local 399 urged the Seventh Circuit to rely upon the *Cavalier* decision as authority for the specific rejection of the Labor Board's attempt to resurrect the *Idarado Mining* theory in the instant case.

The Seventh Circuit recognized that the Labor Board's finding in the instant case was based upon the rationale of *Idarado Mining* and said as follows:

> The Board has decided in other cases that when an employee terminates his relationship with one employer and is subsequently rehired by that same employer, he is treated as a new employee for purposes of joining or not joining the Union, notwithstanding the presence of a valid maintenance of membership clause in the collective bargaining agreement. *Idarado Mining Co.*, 77 NLRB 392 (1948); *Yellow Cab Co.*, 148 NLRB 620 (1964). (slip opinion, page 3)

When the Seventh Circuit considered the contention of Local 399 that the Sixth Circuit decision specifically rejected *Idarado Mining*, the Court said as follows:

> *NLRB* v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (6th Cir. 1973), on which the Union relies, is inapposite. The employee therein executed a checkoff authorization that was self-renewing annually unless the employee took affirmative action. In 1966 the employee quit her work because of illness and did not return until 1969, at which time the employer reinstated the dues checkoff without independent authorization. Characterizing the situation as a "layoff," the court held that the employee was not a "new" employee and therefore the checkoff authorization remained valid. The Sixth Circuit did not "specifically" reject the theory of the Board in *Idarado, supra*, as the Union claims. (quotes in original) (slip opinion page 4)

It is submitted by Local 399 that the Seventh Circuit's conclusion that the Sixth Circuit decision did not "specifically" reject the theory of *Idarado Mining* is erroneous. The above cited language by both the Labor Board and the Sixth Circuit clearly shows that the authority for the Labor Board, to attempt to confer new employee status upon a returning employee, was its *Idarado* decision. The absence of the citation, by name, of the *Idarado Mining* case in the Sixth Circuit decision, does not overcome the fact that the Sixth Circuit conclusion was that the Labor Board's *Idarado* rationale was in error.

Local 399 submits that the decision of the Seventh Circuit is substantially in conflict with the decision of the Sixth Circuit

in the *Cavalier* case, because that decision specifically rejects the second option to join the union theory which is the essence of the *Idarado Mining* decision.

II.

THE DECISION OF THE SEVENTH CIRCUIT PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THE SUPREME COURT

The fact that important questions of labor law were decided by the Seventh Circuit is clearly seen from the reaction of the Labor Board following the issuance of that decision. The initial decision of the Seventh Circuit was issued in an order form under Circuit Rule 28, and was specifically classified as an unpublished order not to be cited. The Labor Board, by a motion dated June 6, 1974, petitioned the court to reconsider its decision not to issue a published opinion. (copy attached as Appendix F) That motion, almost in its entirety, shows the important legal questions that arose from the decision of the Seventh Circuit, in the opinion of the Labor Board.

The Labor Board, in its motion in paragraph No. 2 listed the important questions decided by the Court, as follows:

> 2. In enforcing the Board's order, the Court's decision resolved several issues concerning the union-security obligations of union members who leave bargaining unit jobs for supervisory positions and later return to unit work as employees subject to a maintenance of membership clause. Thus, the Court affirmed: (1) the Board's application of Sections 2(3) and 2(11) to exclude supervisors from bargaining unit "employees" for union-security purposes; (2) the Board's *Idarado Mining* (77 NLRB 392) line of cases; and (3) the Board's factual determinations with respect to the Union's "honorary withdrawal" status. The Court also discussed, and found inapposite, the Sixth Circuit's ruling in *N. L. R. B.* v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (1973). (quotes in original)

Thus the Labor Board motion recognizes substantial issues were considered by the Court. The motion goes on, in paragraph No. 3 to clearly show the far reaching effect of the Seventh Circuit's decision. In this regard the Board motion stated as follows:

> 3. The issues dealt with in the "order" are plainly not "frivolous" or so insubstantial as to require no "explanation of the reasons for the action taken." Circuit Rule 28 (Guidelines for unpublished orders). Rather, the Court has recognized the substantial questions raised and has provided a full explanation of its reasons for affirming the Board's findings. On the surface, it may appear that the Court's decision has significance only for the parties immediately involved in the case. However, we believe that it would be of assistance to the labor relations community to have access to the Court's decision, and to guide their conduct accordingly. And, the Board is, of course, interested in disseminating the fact that the Court has approved the *Idarado Mining* principle, and has read the Sixth Circuit's *Industrial Towel* decision as not rejecting that principle.

The Labor Board's concluding sentence above, that it is interested in disseminating the fact that the Court has approved the *Idarado Mining* principle and has read the Sixth Circuit's *Cavalier* case (called Industrial Towel decision) as not rejecting that principle, is a clear recognition of a split in the Circuits, as cited above. It is submitted that this part of the motion makes it crystal clear that the Labor Board itself considers that a split in the Circuits exists and that the Seventh Circuit decision will be used by the Board for further application of the *Idarado Mining* theory. If any question as to the Labor Board's consideration of the importance of the decision and its planned future application of *Idarado Mining* remained, it was clearly resolved by the Board's paragraph No. 4 which stated as follows:

> 4. For these reasons, the Court's enforcement ruling does involve issues "of continuing public interest" and constitutes "a significant and non-duplicative contribution" to the decisional law under the National Labor Relations Act, and thus should be published under Circuit Rule 28 (Guidelines for published opinions). (quotes in original)

The Board's request was granted by the Court and on June 24 the Court changed its decision from an unpublished order to a printed decision which will be citable as precedent henceforth. (Copy of the Board's Order attached as Appendix G)

The importance of the legal question raised by the Seventh Circuit's decision, however, is not limited to the split in the circuits concerning the *Idarado Mining* theory. As noted by the Labor Board in its initial issue presented, the Court's decision affirms the Labor Board's interpretation and application of Section 2(3) and 2(11) of the Act which results in the exclusion of supervisory employees from the scope of bargaining unit "employees" for union-security purposes.

This Court has recently decided a number of Labor Board cases concerning the relationship of supervisory employees to the bargaining unit employees in a labor union context. *NLRB* v. *Bell Aerospace*, 94 Sup. Ct. 1757 and *Beasley* v. *Food Fair of North Carolina*, 94 Sup. Ct. 2023. The Labor Board obviously considers the decision of the Seventh Circuit as an affirmation of its conclusion regarding the proper interpretation of Sections 2(3) and 2(11) of the Act in a union security situation.

Further, this Court, on June 24, 1974, issued its decision in the *Florida Power and Light* case, 42 L. W. 5059, which concerned the obligation of a supervisor toward the Labor Union of which he is still a member. In that case, this Court concluded that the supervisor, who by his own and the employer's choice retained his membership in the union, had the obligations such membership requires from the employee-member to the union, even though in a supervisory status. It is

submitted that the Seventh Circuit decision, as it interprets the Labor Board *Idarado Mining* theory and the effect of supervisory status of the employee, raises a substantial question concerning this Court's conclusion, and seriously undermines the effect of that decision and the other recent decisions of this Court cited above.

Finally, the Seventh Circuits decision raises an important question of a union member's right to resign from a labor organization, when viewed in relation to the obligations of an existing union security clause situation. In *NLRB* v. *Boeing Company, Inc.*, 93 Sup. Ct. 1952 this Court specifically reaffirmed its earlier conclusion that there exists a contractual relationship between the union member and his union. This Court said as follows:

* * * * *

> As we noted in *Allis-Chalmers*, court enforcement of union fines is not a recent innovation but has been known at least since 1867. 388 U. S. at 182 n. 9. See also Summers, "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L. J. 175 (1960). The relationship between a member and his union is generally viewed as contractual in nature. *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 618 (1958); *Scofield* v. *NLRB*, *supra*, 394 U. S., at 426 n. 3; *NLRB* v. *Granite State Joint Board*, 409 U. S. 213, 217 (1972), and the local law of contracts or voluntary associations usually governs the enforcement of this relationship. *NLRB* v. *Allis-Chalmers Manufacturing Company*, *supra*, 388 U. S., at 192 and 193, n. 32; *Scofield* v. *NLRB*, *supra*, 394 U. S., at 426 n. 3. (93 Sup. Ct. 1952 at page 1957.)

Thus, this Court restated the source of the duties that a member owes to his Union. Further, that decision made specific reference to the effect of this proviso of Section 8(b)(1)(A) of the Act. This court said:

> Section 8(b)(1)(A) of the Act provides, in pertinent part, that it shall be an unfair labor practice for a labor

> organization "to restain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title." 29 U. S. C. § 158(b)(1)(A) (1970). Among the § 7 rights guaranteed to employees is the right to refrain from any of the concerted activities described in that section. *Id.*, § 157. We have previously held that § 8(b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws. NLRB v. Allis-Chalmers Mfg. Co., 388 U. S. 175, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967); Scofield v. NLRB, 394 U. S. 423, 89 S. Ct. 1154, 22 L. Ed. 2d 385 (1969). (footnotes omitted) (93 Sup. Ct. 1952 at page 1955.)

The decision of the Seventh Circuit affirms the Labor Board conclusion that an employee may void the effect of valid internal Union rules concerning the retention of membership, by working as a supervisor and then returning to the bargaining unit.

In addition, as noted in the *Boeing* case this Court has also recently considered the question of what obligations a union member has to his Union, insofar as the retention of membership is concerned. Thus, in the case of *NLRB* v. *Granite State Joint Board*, 409 U. S. 213, this Court concluded that an employee-member could withdraw from the Union when the collective bargaining union security provisions were no longer effective, due to the hiatus in that collective bargaining agreement. This Court's conclusion, that a resignation may be effective as to the union member's relationship to the Union, however left standing a decision by the Court of Appeals for the First Circuit which is known as the *Pauling* case, *NLRB* v. *International Union, United Automobile, A & A Wkrs.*, 320 F. 2d 12. That decision concerned, directly, the question of a Union's internal rules regarding the retention of membership, under a maintenance of membership clause that was then currently in

effect. The *Pauling* case, which was cited by Local 399 to the Seventh Circuit, clearly stands for the proposition that where an employee voluntarily joins the union under a maintenance of membership provision, which by its terms do not require membership, then a greater obligation to comply with the Union's valid internal rules is devolved upon that employee-member. Specifically, the First Circuit said on that point as follows:

> "However, we believe that *it is quite another thing when the employee eschews his 'reluctance' and voluntarily joins a labor organization. At this point, under our view, the employee takes off the protective mantle of Section 7's 'refraining' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot.*
>
> * * * * *
>
> *"In short, we believe that the Union's Constitution and By-laws—here relevant—were valid and viable provisions with which the employees had to comply if they desired to effectively sever their relationship with the Union.* It is true that under Section 7 of the Act, and in the light of the limited security agreement which obtained between the Company and the Union in the instant case, the subject employees need not have joined the Union. However, *once they voluntarily took that step, they embraced not only the benefits but also the burdens which flowed from their union membership. One of those 'burdens' was the duty of comporting with the Union's reasonable internal regulations; a requirement they failed to discharge here."* (Emphasis supplied.) (320 F. 2d 12 at page 16.)

Thus the Seventh Circuit decision, which is noted by the Labor Board as its third substantial question, namely the Board's factual determination with respect to the union's "honorary withdrawal" status, is clearly of major significance insofar as the application of the proviso of 8(1)(A) is concerned.

The decision of the Seventh Circuit in the instant case concerns a number of basic questions which have been, and con-

tinue to be, of primary interest to the Labor Board and this Court in the area of the employee-member relationship with his union. In addition, it makes a substantial pronouncement concerning the obligations that devolve upon the employee-member under a maintenance of membership type of union security clause.

CONCLUSION

The split among the Circuits as to the propriety of the Board's attempt to reactivate its *Idarado Mining* theory is a sufficient basis for this Court to exercise its jurisdiction and grant the Petition.

However, in addition to the conflict among the Circuit Courts, there are presented substantial federal questions in the area of a union member's obligation to his union plus the duties required by an employee-member under a maintenance of membership provision. It is submitted that the instant decision is an appropriate case for this Court to resolve the conflict among the Circuits and to clarify the rights and obligations of union members under Section 8(b)(1)(A) so that the Labor Board may properly administer this important section of the statute.

For the reasons set out above the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 73-1293 September Term, 1973 January Session, 1974

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

ILLINOIS BELL TELEPHONE COMPANY,
Intervenor,

vs.

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board.

Argued January 14, 1974—Decided April 17, 1974

Before KILEY, *Senior Circuit Judge,* CUMMINGS and SPRECHER, *Circuit Judges.*

PER CURIAM. The Labor Board's enforcement petition presents the issue whether the Board properly found that the respondent Union[1] violated §§ 8(b)(2) and (1)(A) of the National Labor Relations Act[2] by threatening and attempting to cause the discharge of employee Galka for non-payment

1. Local 399, International Brotherhood of Electrical Workers, AFL-CIO.

2. 29 U. S. C. § 151 *et seq.*

of Union dues upon his return to the bargaining unit from which he had earlier been transferred to a supervisory position. We hold the Board's order is supported by substantial evidence in the record as a whole, and grant enforcement.

In March, 1968, Robert Galka, an eight year employee of intervenor Illinois Bell Telephone Company (Bell) and member of respondent Union, was promoted from his position as communications maintenance man to a supervisory position as station installation foreman. He informed Union steward Maddox that since he "was in management and . . . wasn't in the Union any more," his dues should be discontinued. This was done, and contact with the Union terminated.

In February, 1969, Galka left his supervisory position and returned to the bargaining unit. Union steward Nalefski told Galka in April that he had some cards for him to sign "in order . . . to get . . . Union dues started again." Galka agreed, but no cards were presented.

Nothing further was done until June, 1970, when Maddox told Galka that he was "in trouble" because he owed "some back dues" since he was "automatically" reinstated to Union membership in February, 1969, when he rejoined the unit. Galka disagreed and refused to sign a payroll deduction card. On July 1 the Union wrote Bell that if Galka did not pay the back dues Bell should fire him. Galka told Maddox he would pay current, but not back, dues, and Maddox said Galka's "job was at stake." Bell agreed with Galka and refused to fire him then, and in September, upon a renewed request by the Union. In December Union attorney Fitzgerald wrote Galka implying that the Union would insist on Bell firing him. Galka then, at Bell's suggestion, paid back dues of $141.45 "under protest."

On March 23, 1971, Bell filed the instant charge. After a hearing, the Administrative Law Judge found that Galka returned to the bargaining unit as a "new employee" without any obligation to rejoin the Union; that there was no evidence that

Galka had been retained in the Union on "honorary withdrawal" status while he was a foreman; and that the Union committed an unfair labor practice within the meaning of §§ 8(b)(1)(A) and (2) of the Act by attempting to have Bell fire Galka for failure to pay Union dues he was not obligated to pay. The Judge also found Fitzgerald's letter violative of § 8(b)(1)(A). The Judge ordered the Union to repay Galka $141.45 plus interest and to inform Bell to disregard Galka's checkoff authorization until he executed a new one.

The Board adopted the Judge's findings and decision and accepted his recommended order. The enforcement proceeding before us followed.

The Union contends that Galka's status as a Bell employee continued while he was a foreman, and that that continuing status, coupled with the maintenance of membership clause in the collective bargaining agreement, obligated him to rejoin the Union and to pay the back dues upon his reentry into the bargaining unit. Furthermore, the Union contends that, pursuant to Article XXVI, §§ 3 and 4 of its constitution, during his term as a foreman Galka was on "honorary withdrawal" status in the Union and was automatically reinstated to Union membership on return to the unit. Neither contention has merit.

The Board has decided in other cases that when an employee terminates his relationship with one employer and is subsequently rehired by that same employer, he is treated as a new employee for purposes of joining or not joining the Union, notwithstanding the presence of a valid maintenance of membership clause in the collective bargaining agreement. *Idarado Mining Co.*, 77 NLRB 392 (1948); *Yellow Cab Co.*, 148 NLRB 620 (1964).

The same is true of an employee transferred out of the bargaining unit who then returns to it. He "stands in the same shoes as one being hired by the . . . Company for the first time, who has never been a member of the . . . Union. . . ." *Convair*, 111 NLRB 1055, 1056 (1965). See also *Kaiser Steel Corp.*, 125 NLRB 1039, 1041 (1959).

Galka became a "supervisor" within the meaning of § 2(11) of the Act when elevated to foreman. Section 2(3) specifically excludes "supervisors" from the definition of "employees." Under the Board's policy as stated in the aforementioned cases, we think that when Galka became a foreman, his statutory status as an "employee" within the bargaining unit was terminated as it would have been if he had left Bell and gone to work elsewhere, and that when he rejoined the bargaining unit, he was not obligated to rejoin the Union.

NLRB v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (6th Cir. 1973), on which the Union relies, is inapposite. The employee therein executed a checkoff authorization that was self-renewing annually unless the employee took affirmative action. In 1966 the employee quit her work because of illness and did not return until 1969, at which time the employer reinstated the dues checkoff without independent authorization. Characterizing the situation as a "layoff," the court held that the employee was not a "new" employee and therefore the checkoff authorization remained valid. The Sixth Circuit did not "specifically" reject the theory of the Board in *Idarado, supra*, as the Union claims.

We think too that the Administrative Law Judge was justified in finding that Galka was not on "honorary withdrawal" status while he was a foreman. The Union's constitution provides for two methods of conferring this status on a member.[3] The first,

3. Article XXVI:

Sec. 3. Any member not desiring to maintain his standing, who retires from the trade or is unemployed, or in such other cases as may be decided by the L. U., may be issued an honorary withdrawal card provided dues are paid for the previous month or the current month if the application is made after the fifteenth of such month.

Upon returning to the trade, or again becoming employed, and having complied with this Article, he shall deposit his withdrawal card in the L. U. that issued it and continued membership by paying the current month dues. No new initiation fee is necessary, except that any (A) member shall pay the $2 fee as required in Article X.

Sec. 4. "B. A." members not employed under the jurisdic-

requiring issuance of an "honorary withdrawal card" to the individual, is clearly inapplicable here since Galka never received such a card. The second method allows the member to "be shown as on honorary withdrawal without actual issuance of the card." This is the method the Union contends it utilized in this case.

However, the Judge did not err in finding that the second method was "permissive rather than automatic in application,"[4] and that the Union introduced no evidence to indicate that Galka was "shown on honorary withdrawal." The Board's determination on this point in no way impaired the Union's right under the proviso in § 8(b)(1)(A) "to prescribe its own rules with respect to the acquiring or retaining of membership. . . ."

Finally, although a contrary inference than that drawn by the Judge can be drawn from the "appropriate action" language of Fitzgerald's letter to Galka (that is, that Fitzgerald would take legal action on the alleged debt rather than seek to have Galka discharged), we think there is substantial evidence in the record as a whole to support the Judge's inference that Fitzgerald's letter threatening Galka's discharge and constituted an unfair labor practice.

For the reasons given, the Board's order will be enforced.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

tion of the Local Union, for at least a month can be shown as on honorary withdrawal without actual issuance of the card, unless the L. U. Bylaws provide otherwise. Officers of the L. U. are not entitled to withdrawal status without forfeiture of their office.

4. Since the member "can be shown as on honorary withdrawal," it follows that he need not be.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
June 24, 1974.

Before
HON. ROGER J. KILEY, SR., *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* No. 73-1293 *vs.* LOCAL UNION 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Respondent.*	Application for Enforcement of an Order of the National Labor Relations Board.

This matter comes before the Court on the "Motion To Reconsider Decision Not To Issue Published Opinion", filed herein on June 8, 1974 by counsel for petitioner. On consideration whereof, this Court being fully advised on the premises,

IT IS ORDERED that the previous "Unpublished Order" of this Court entered pursuant to Circuit Rule 28 be reissued as a printed opinion. Said printed opinion will be citeable as precedence henceforth.

APPENDIX C

D—6801
Decatur, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and ILLINOIS BELL TELEPHONE COMPANY	Case 38-CB-351

Decision and Order

On June 16, 1972, Administrative Law Judge[1] Wellington A. Gillis issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the Charging Party filed a brief in opposition to the exceptions, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

1. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

2. The Respondent's July 7 request for oral argument is denied inasmuch as the record and the briefs adequately present the positions of the parties.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Local Union 399, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

Dated, Washington, D. C. Dec. 21, 1972.

.....

EDWARD B. MILLER, *Chairman*

.....

HOWARD JENKINS, JR., *Member*

.....

JOHN A. PENELLO, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-429-72
Decatur, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

LOCAL UNION 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and ILLINOIS BELL TELEPHONE COMPANY	Case No. 38-CB-351

Ira S. Epstein, Esq., for the General Counsel.

Edward W. Bergmann, Esq., of Seyfarth, Shaw, Fairweather & Geraldson, of Chicago, Ill., for the Charging Party.

Robert E. Fitzgerald, Jr., Esq., of Chicago, Ill., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

Wellington A. Gillis, Trial Examiner: This case was heard by me at Decatur, Illinois, on April 25, 1972, and is based upon a charge filed on March 22, 1971, by Illinois Bell Telephone Company, hereinafter referred to as the Company or Illinois Bell, upon a complaint, issued on March 1, 1972, by the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, against Local Union 399, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the Respondent or the Union, alleging violations of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), and upon an answer timely filed by the Respondent denying the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. Subsequent to the close of hearing, timely briefs were filed by counsel for all parties.

Upon the entire record in this case,[1] and from my observation of the witnesses, and their demeanor on the witness stand and upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496), I make the following:

Findings and Conclusions

I. Commerce

Illinois Bell Telephone Company is an Illinois corporation with offices and places of business located in various places in Illinois, including a Decatur, Illinois, facility, where it is engaged in the business of providing telephone communications. During the 12 month period immediately preceding the issuance of complaint, the Company received gross revenues in excess of $100,000. The parties admit, and I find, that Illinois Bell Telephone Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted and I find, that Local Union 399, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

---

1. Consistent with my recollection of the testimony and in conformity with the undisputed facts, I hereby grant the General Counsel's motion, filed subsequent to the close of the hearing, to correct the transcript as follows:

P. 29 l. 12 "1969" is corrected to read "1968".

P. 29 l. 24 "1968" is corrected to read "1969".

III. The Alleged Unfair Labor Practices

The Issue

Whether, under a maintenance of membership contract, an employee who leaves the bargaining unit to take a supervisory position with the employer, and subsequently returns to his former job in the bargaining unit, is compelled to resume his dues obligation to the union.

The Facts

For many years a contractual relationship has existed between Illinois Bell and Local 399, the most recent contract providing for a maintenance of membership union security clause. In pertinent part, the clause provides that "All employees with 30 days or more of employment with the Company who on November 30, 1948, were members or who thereafter became membres of Local Unions 165, 315, 336 or 399, shall maintain their membership in the Union in good standing as a condition of employment under this Agreement after June 30, 1968."

Robert Galka, the alleged discriminatee herein, first went to work for the Company at its Decatur, Illinois plant on September 1, 1959, as a frame man. The following March 1960, Galka joined the Union. Eight years later, on March 15, 1968, Galka, who was then a communications maintenance man, was appointed to a supervisory position as a station installation foreman with the Company at Decatur. This position was outside the bargaining unit represented by the Union. On February 9, 1969, Galka, at his own request, left management and returned to the job of communications maintenance man, back within the unit.

In April 1968, shortly after Galka's elevation to foreman, Galka talked with Don Maddox, Local 399's chief steward, at the Company's South Garage. Galka told Maddox, "since I was in management and I wasn't in the Union any more, that I

would like to have my union dues stopped," to which Maddox replied that he would take care of it. While at no time was Galka ever given a withdrawal card to sign, within a month or two after the conversation with Maddox, he stopped receiving all union literature, including copies of the Electrical Workers' journal, and had no further contact with Local 399 during the remainder of the time he was foreman.

In April 1969, shortly after he returned to his communications maintenance job within the bargaining unit, while Galka was picking up some equipment in the Switchboard Equipment Repair Room and conversing with Jim Nalefskin, a building steward for Local 399, Nalefskin told Galka that he had some cards for him to sign "in order for me to get my union dues started again." Galka replied that that was fine. However, Galka never received any cards,[2] nor any further communication of any kind until 14 months later when, in June 1970, Maddox approached Galka on the job and told him that he was in trouble. When Galka asked why, Maddox told him it was because he owed the Union some back dues. Galka asked Maddox how he figured that he owed any back dues if he was not a member. Maddox told him that he automatically was a member. When Galka asked why he had not received a membership card or any union materials, Maddox replied that that was beside the point, that he owed back dues and if he would sign a payroll deduction card the Union would bill him later for the back dues. Galka replied that he would not sign anything under those circumstances. In leaving, Maddox asked if he knew what this meant, to which Galka answered that he did not care what it meant.

By letter dated July 1, 1970, to G. D. Fritz, Company General Personnel Supervisor, copy to Galka, the Union, citing

2. Contrary to Galka, from whose testimony the quoted testimony is taken, Nalefskin could not recall having any conversation with Galka at that time. In view of Nalefskin's mere failure to recall and the fact that Galka testified with assurance as to the event, I credit the latter's testimony.

the fact that Galka had returned to a job under Local 399's jurisdiction, asserted that Galka had refused to sign a new payroll authorization card for deduction of union dues. The letter also stated that:

> Mr. Galka, to become a member in good standing in this Local Union, must pay all back union dues from February 1969, to August of 1970, or until such time his payroll deduction of union dues starts.
>
> If Mr. Galka refuses to do this immediately, I am requesting I. B. T. Company to enforce the negotiated agreement between Illinois Bell Telephone Company and Local Unions 134, 165, 315, 336, and 399, Article III, Union Security.

Shortly after receiving his copy of this letter, Maddox approached Galka at his desk and asked him if he had received it. Galka replied that he had and said he would like to talk to him about the whole thing. The two proceeded to a more private room, and discussed the matter. Galka told Maddox that he had no objections to joining the Union. Maddox indicated that that was not the issue, that under the Union's Constitution, the copy of which he showed Galka[3] he was automatically a member and owed the Union "all these back dues that I hadn't paid," dating back to February 1969. Galka again reiterated his feeling that he did not owe any back dues, to which Maddox replied that Galka's job was at stake and that he would hate to see him lose it for $140 of back dues. At some point, Maddox suggested that in the event that he had a problem in repaying the amount due, time payments could be arranged.

On July 30, 1970, by letter, Fritz to Delbert Brown, Local Union President and Business Manager, the Company replied to

3. Maddox referred Galka to Section 4 on Pg. 78, which reads: Sec. 4. "B. A." members not employed under the jurisdiction of the Local Union, for at least a month can be shown as on honorary withdrawal without actual issuance of the card, unless the L. U. Bylaws provide otherwise. Officers of the L. U. are not entitled to withdrawal status without forfeiture of their office.

the Union to the effect that, in the opinion of the Company's legal staff, it would be a violation of the National Labor Relations Act to discharge Galka at the Union's request for refusing to reestablish membership, that to do so would expose both the Company and the Union to backpay liability, and suggesting that the Union refer the matter to its counsel.

By letter of September 24, 1970, the Union advised the Company as follows:

> To clarify any possible misunderstanding concerning our letter of July 1, 1970, Local 399 hereby requests the discharge of Robert L. Galka, because of his failure to tender Union dues as required by the Contract Article III, Union Security.
>
> May we have your reply to this renewed request by October 2, 1970.

On September 29, 1970, the Company by letter declined to comply with the Union's discharge request for reasons set forth in its earlier reply to the Union.

At some time after July, 1970, having heard that matters pertaining to him had been discussed at a union meeting, Galka arranged to meet with Maddox. On this occasion, Galka told Maddox that he had heard that statements had been attributed to him at the union meeting which he had not made. Galka reiterated to Maddox that he had nothing against joining the Union, and refuted Maddox's assertion that he had automatically reverted to his union membership. Galka also told Maddox that he had heard that he (Maddox) had stated at the meeting that he had given payroll and other cards to Nalefskin, who in turn, had given them to Group Steward Chuck Beams, and that Galka had refused to sign them. Galka told Maddox that this was not true. Galka told Maddox that he also heard, contrary to the fact, that the Union had agreed to let him pay back just half the back dues, that such an offer had in fact not been made to him, and that he would not have paid just half of the asserted amount in any event. Maddox told Galka that this had been

a union meeting at which "they had a right to air their differences in different cases, and this is just what they did." Maddox followed this with the statement that Galka's job was at stake and that he would hate to see him lose it.

About a week later, Galka encountered Beams on the job and asked him if he ever remembered giving him any cards to sign. Beams replied that he had not, that "this was all sort of news to him," and that he considered Galka an active union member.

On December 3, 1970, Robert Fitzgerald, attorney for Local 399, wrote the following letter to Galka:

> Please be advised that I am attorney for Local Union 399, International Brotherhood of Electrical Workers.
>
> My client informs me that you are delinquent with your dues to their organization from February, 1969 to the present date. They inform me further that you have been a member of the International Brotherhood of Electrical Workers continuously from March 1960.
>
> Unless you tender an amount of money equal to the dues owed or make mutually satisfactory arrangements for the payment thereof by December 11, 1970, I will be forced to take appropriate action on their behalf.

Upon receiving this letter, Galka called Fritz at his home, mentioned the letter, and asked for advice as to what he should do. Fritz told Galka that he would get in touch with the company attorney in Chicago early Monday and, after talking with him, that he would be back in touch with Galka. The following Monday, Galka talked with Fritz and a Mr. Furlong, company attorney at the time. It was decided in order to protect Galka's job that he should pay the Union the amount requested and also sign a payroll deduction card, but stating on the back thereof "paid under protest." When Galka told Furlong and Fritz that he did not have the $140 in time to meet the deadline set by Fitzgerald, Fritz arranged for an employee loan for Galka for this purpose. A loan was then made to Galka by the Company on December 8, 1970, in the amount of $142.

On December 10, Galka called Maddox, and requested that he come on down, that he had a check for him in the amount of the dues. Maddox met Galka at his desk where Galka gave him a check for $141.45, writing on the back the words, "paid under protest." At this time Galka also signed a payroll deduction card. Maddox gave Galka a receipt for his check, stating thereon, "dues from February 1969 through December 1970."

Analysis and Conclusions

As stated at the outset, the issue presented is whether, under a maintenance of membership contract, an employee who leaves the bargaining unit to take a supervisory position with the employer, and subsequently returns to his former job in the bargaining unit is compelled to resume his dues obligation to the Union. The General Counsel and the Company contend that in April 1968, Galka severed his relationship with the bargaining unit and the Respondent, and that upon returning to the bargaining unit from a supervisory position in February 1969, he stood in the same shoes as a new employee and, thus, had an option of joining or not joining the Union. The General Counsel and the Company assert that, having decided not to join, Galka was not covered by the maintenance of membership contract, was, therefore, not subject to discharge for failure to pay dues, and that Respondent's action taken to collect dues not owing and to cause Galka's discharge is violative of Section 8(b)(1)(A) and (2) of the Act.

The Respondent takes the position that, under the Union's constitution, Galka was automatically placed on honorary withdrawal status when he left the bargaining unit, and that when he returned to his job within the unit he became obligated to begin paying dues again. The Respondent also asserts that Galka retained his employee status while in management, and therefore, under the maintenance of membership provision of the contract, Galka was obligated to resume his dues obligation. Thus, the Respondent's argument is premised upon the assertion

that, during his period with management, Galka (a) retained his union membership and (b) continued in the employment of the Company.

Treating first the argument that Galka retained his membership in the Union during his stint with management, the Respondent asserts that Galka was automatically placed on honorary withdrawal status and relies upon Article XXVI, Sec. 3 and 4 of the Union's constitution, which in pertinent part provides as follows:

> Sec. 3. Any member not desiring to maintain his standing, who retires from the trade or is unemployed, or in such other cases as may be decided by the L. U., may be issued an honorary withdrawal card provided dues are paid for the previous month or the current month if the application is made after the fifteenth of such month.
>
> Upon returning to the trade, or again becoming employed, and having complied with this Article, he shall deposit his withdrawal card in the L. U. that issued it and continue membership by paying the current month dues. No new initiation fee is necessary, except that any (A) member shall pay the $2 fee as required in Article X.
>
> Sec. 4. "B. A." members not employed under the jurisdiction of the Local Union, for at least a month can be shown as on honorary withdrawal without actual issuance of the card, unless the L. U. Bylaws provide otherwise. Officers of the L. U. are not entitled to withdrawal status without forfeiture of their office.

Contrary to the Respondent's position, it would appear that Section 3, above, is not applicable to Galka, for Galka registered no such intention or desire to maintain his standing in the Union and, in fact, apprised the Union's chief steward in April 1968, that he considered himself out of the Union and wished his dues stopped. Thus, as Galka did not apply for an honorary withdrawal card, and was never issued one, the remainder of Section 3 of the constitution requiring a deposit of such card and a resumption of membership and dues payment is not applicable.

As to Section 4, thereof, holding that "B. A." members can be shown as on honorary withdrawal without the issuance of a card, this provision, while perhaps open to contrary construction, appears to be permissive rather than automatic in application. In this regard, it would appear that the Respondent has the obligation to come forward with evidence to show that Galka was in fact "shown as on honorary withdrawal" on the Union's records. This, the Respondent failed to do. I find the Respondent's argument in this regard to be without merit.

Even were this not the case, over and above these factors, the Board has made it quite clear that an employee's obligations under a maintenance of membership or union security provision are determined by the collective bargaining contract and not by the Union's constitution. In *Newspaper Guild of Buffalo, et al.*,[4] involving the discharge of an employee under a union security provision for failure to pay dues, the Board held that an employee's union rights and obligations must be distinguished from his employment rights and found that an employee's failure to resign from the Union in a manner prescribed by the Union's constitution did not affect the right to retain his job with the employer under the union security contract.[5]

Turning, then, to the Respondent's argument that Galka, throughout, retained his employment status with the Company, while it is true that under the contract for seniority purposes Galka was credited with his earlier employment within the unit, the fact is that, upon assuming the supervisory position with management, Galka severed his employee relationship within the bargaining unit under the contract. At that point, he removed himself from the status of an employee to that of a supervisor within management. While, in the strict sense of the word, it could be argued that Galka continued in the employ of the Company, certainly he did so not as an employee.

4. 118 NLRB 1471 at 1473.

5. See *Local 899, UAW*, 137 NLRB 901; *Local 338, Boilermakers*, 166 NLRB 874; and *Yellow Cab Co.*, 148 NLRB 620.

Moreover, the Board on several occasions has held that employees who leave their employment under a collective bargaining contract do not have an obligation to automatically resume the payment of dues under a union security clause upon their return to work, and that their union membership obligations are considered severed by their termination of employment. In *Idarado Mining Co.*,[6] the Board was confronted with a very similar situation where an employee had joined the union under a maintenance of membership provision, later left the company for about a year, and then was reemployed. The Board held:

> The obligation under the contract to remain a member in good standing of the contracting union rested on employees. When Miller severed his employment relationship with the respondent, his obligation to remain a member in good standing of the Mine Production Workers ended at the same time. The obligation was not merely suspended, ready to be imposed at any time in the future that Miller might be again employed by the respondent. On his reemployment by the respondent, in a new position and as a new employee, approximately a year after he had voluntarily resigned from the respondent's employ, Miller's status was like that of any other new employee; he was required to remain a member in good standing of the Mine Production Workers only if he voluntarily rejoined that organization after his reemployment.

The distinguishing features of *Idarado* is that, there, the employee left the company and returned to a different job, whereas, here, Galka became part of management and returned to the same job. However, the Board in *Idarado* emphasized the fact, present here, that there was no indication that the employment termination was other than *bona fide* or for the purpose of evading his obligation to maintain his union membership.

In the *Yellow Cab* case, *supra*, involving an employee and union member who left the company's employ and was subsequently rehired in the same job, analogizing to the *Idarado*

6. 77 NLRB 392.

case, it was held that the obligation to remain a union member as a condition of employment "was not merely suspended" but ended when the employee terminated his job, and that ". . . the right of the employee to return and continue to work for his employer is to be determined as though he never worked for such an employer on a pervious occasion."

While giving rise to a different issue, the Board held in *Kaiser Steel Corp.*,[7] that employees who have left the contract unit to take supervisory positions with their employer and were seeking to return to their old jobs within the unit "must be viewed as applicants for rank-and-file employment who were entitled to the protection of the Act."

Applying the above principles to the facts of this case, I find that when Galka left the bargaining unit in March 1968, to take a supervisory position with the Company, he did so with a *bona fide* intention of not returning, that his obligation to retain membership in the Union under the collective bargaining agreement ceased as of that time, and that, upon his return to his job within the bargaining unit in February 1969, he was in the position of a new employee, with no obligation under the contract to resume the payment of union dues. Accordingly, I find that, on September 24, 1970, in requesting the Company to discharge Robert Galka because of his failure to tender union dues for which he was not obligated, the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

The complaint herein also alleges as violative of Section 8(b)(1)(A) of the Act the alleged threat of Attorney Robert Fitzgerald contained in his letter of December 3, 1970, to Galka in which Fitzgerald, identifying himself as attorney for the Union, stated, "Unless you tender an amount of money equal to the dues owed or make mutually satisfactory arrangements for the payment thereof by December 11, 1970, I will be forced to take appropriate action on their behalf." At the close of the hearing,

7. 125 NLRB 1039.

counsel for Respondent renewed his motion to strike this allegation, on the ground that the reference therein to "appropriate action" was a reference to legal action to collect the debt owing the Union and not a threat to discharge.

While the language used by Attorney Fitzgerald is, perhaps, open to a different interpretation, when following, as it did, two earlier union requests of the employer to discharge, the fact remains that this was the first written communique directed to Galka, that it made specific reference to his asserted union membership and dues delinquency, and that, as the Union had theretofore been unsuccessful in its attempt by itself to cause the Employer to discharge, Galka understandably could have taken this, as in fact he did, as a follow-up threat to seek his discharge if he did not pay. Had Attorney Fitzgerald, sophisticated as he is with union matters under union security contracts, really intended the reference to apply to legal action he could easily have been more specific in choosing his language.

The Respondent's Motion to Strike, ruling upon which I had reserved, is hereby denied. I find that the Respondent, by its agent, Robert Fitzgerald, Jr., unlawfully threatened Robert Galka with causing his discharge on December 3, 1970, if he failed to pay union dues for which he was not obligated, and that such constitutes a violation of Section 8(b)(1)(A) of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. The Respondent, Local Union 399, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Illinois Bell Telephone Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By attempting to cause Illinois Bell Telephone Company to discharge Robert L. Galka because he failed to pay union

dues for which he was not obligated, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By threatening employees with causing their discharge if they failed to pay union dues for which they are not obligated, the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

5. By restraining and coercing employees of Illinois Bell Telephone Company in the exercise of the rights guaranteed by Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

IV. The Effect Upon Commerce of the Unfair Labor Practices

The activities of the Respondent set forth in section III, above, occurring in connection with the operation of Illinois Bell Telephone Company, as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and that it take certain affirmative action which is necessary to effectuate the policies of the Act.

It having been found that the Respondent, through its unlawful conduct herein, caused Robert Galka to pay union dues for which he was not obligated and did not owe in the amount of $141.45, it is recommended that the Respondent be made to reimburse Galka the sum of $141.45, with interest at 6 per-

cent in accordance with Board policy set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In view of the circumstances under which Galka signed a payroll deduction card on December 10, 1970, including the threat to cause his discharge if he did not pay back dues and the fact that such was executed in order to protect his job, it is recommended that the Respondent cease giving effect to the checkoff card and causing Illinois Bell Telephone Company to make dues deductions from Galka's pay unless, and until, such time as Galka should, if he desires to, choose to reexecute it. It is further recommended that the Respondent be made to reimburse Galka for all dues collected pursuant to the checkoff authorization with interest, as above.

Upon the foregoing facts, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

Order

Respondent, Local Union 399, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Attempting to cause Illinois Bell Telephone Company to discharge Robert Galka because he failed to pay union dues for which he was not obligated.

(b) Threatening employees with causing their discharge if they did not pay union dues for which they were not obligated.

8. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Restraining and coercing employees of Illinois Bell Telephone Company in the exercise of the rights guaranteed by Section 7 of the Act.

(d) In any like or related manner, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reimburse Robert Galka for all union dues collected since December 10, 1970, with interest, as set forth above in the section entitled "The Remedy."

(b) Advise Illinois Bell Telephone Company that no further dues deduction will be made from the pay of Robert Galka unless, and until, a new payroll deduction card is executed by him.

(c) Post in conspicuous places at its office and union hall in Decatur, Illinois, including all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix."[9] Copies of the notice, on forms provided by the Officer-in-Charge for Sub-Region 38, shall, after being duly signed by authorized representative of the Respondent, be posted by it, as aforesaid, immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Promptly, upon receipt of copies of said notice from the Officer-in-Charge, return to him signed copies for posting by

9. In the event that the Boa d's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Illinois Bell Telephone Company, it being willing, at the Company's Decatur, Illinois, facility.

(e) Notify the Officer-in-Charge for Sub-Region 38, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[10]

Dated at Washington, D. C.

/s/ WELLINGTON A. GILLIS
Wellington A. Gillis
Trial Examiner

10. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Officer-in-Charge for Sub-Region 38, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

C20

NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT attempt to cause Illinois Bell Telephone Company to discharge employees because they failed to pay union dues for which they are not obligated.

WE WILL NOT threaten employees with causing their discharge for failing to pay union dues for which they are not obligated.

WE WILL NOT restrain or coerce employees of Illinois Bell Telephone Company in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their Section 7 rights.

WE WILL reimburse Robert Galka for all dues unlawfully collected since December 10, 1970, with interest thereon at 6 percent per annum.

WE WILL advise Illinois Bell Telephone Company that no further dues deductions will be made from the pay of Robert Galka until, and unless, said employee executes a new payroll deduction card.

LOCAL UNION 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower 10th Floor, 411 Hamilton Blvd., Peoria, Ill. 61602 Telephone (309) 673-9061 X282.

APPENDIX D

Constitution of International Brotherhood of Electrical Workers Article XXII, Sections 2 thru 4 provide as follows:

"Sec. 2. Each applicant for membership shall fill out an application blank furnished or approved by the I. S., and answer all questions. The original application or a copy must be sent to the I. S.

"Sec. 3. *The acceptance of an application for membership, and the admission of the applicant into any L. U. of the I. B. E. W., constitutes a contract between the member, the L. U. and the I. B. E. W., and between such member and all other members of the I. B. E. W.*

"Sec. 4. Each applicant admitted, shall, in the presence of members of the I. B. E. W., repeat and sign the following obligation:

" 'I, ..., in the presence
(Give name)
of members of the International Brotherhood of Electrical Workers, *promise and agree to conform to and abide by the Constitution and laws of the I. B. E. W.* and its local unions. I will further the purposes for which the I. B. E. W. is instituted. I will bear true allegiance to it and will not sacrifice its interest in any manner.' " (Emphasis supplied.)

Article XXVI provides:

"Sec. 1. Any member who becomes a general manager or superintendent, or who retires from his trade, may apply to the F. S. for a withdrawal card. It shall require a majority vote at a meeting to grant such card. But the L. U. has the right to require such a member to take out a withdrawal card if it so decides.

* * * * *

"Sec. 3. Any member not desiring to maintain his standing, who retires from the trade or is unemployed, or in such other cases as may be decided by the L. U. may be issued an honorary withdrawal card provided dues are paid for the previous month or the current month if the application is made after the 15th of such month.

"Upon returning to the trade, or again becoming employed, and having complied with this article, he shall deposit his withdrawal card in the L. U. that issued it and continue membership by paying the current month dues. No new initiation fee is necessary, except that any 'A' member shall pay the $2 fee as required in Article X.

"Sec. 4. *'BA' members not employed under the jurisdiction of the local union, for at least a month can be shown as on honorary withdrawal without actual issuance of the card,* unless the L. U. bylaws provide otherwise. Officers of the L. U. are not entitled to withdrawal status without forfeiture of their office." (Emphasis supplied.)

APPENDIX E

Collective Bargaining Agreement between Illinois Bell Telephone Company and Local 399 I. B. E. W.

Provides in relevant sections as follows:

Article III, Section 2 (Page 5)

"Section 2. *All employees with thirty days or more of employment with the Company who* on November 30, 1948, were members or who thereafter *become members of* Local Unions 165, 315, 336 or *399 shall maintain their membership in the Union in good standing as a condition of employment under this Agreement* after June 30, 1968.

Article XXI, section 5, Subparagraph (b), (Pages 27-28)

"(b) *A person retransferred from anywhere within the Company to work covered by this Agreement shall resume the amount of seniority he had established as of the date of transfer from work covered by this Agreement plus an amount equal to Bell System service credited to him during the period between transfer and retransfer* provided, however, that if the date of transfer from work covered by this Agreement preceded August 8, 1947, he shall be credited with seniority equal to his net credited Bell System service.

Exhibit C, Subsection (e) (Page 71)

"(e) *Cancellation of Union dues shall be deemed effective* upon (1) written order from employees, (2) *transfers out of bargaining unit,* (3) resignation, (4) retirement, (5) leaving the service of the Company for other reasons, or (6) death of the employee." (Emphasis supplied.)

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
ILLINOIS BELL TELEPHONE COMPANY,
Intervenor,
vs.
LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

No. 73-1293

MOTION TO RECONSIDER DECISION NOT TO ISSUE PUBLISHED OPINION

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court to reconsider its decision to issue its ruling in the above case as an unpublished "order," rather than a published "opinion." In support thereof, the Board shows as follows:

1. On April 17, 1974, the Court enforced an order of the Board reported at 200 NLRB No. 159. The Court's 5-page decision was classified as an "order" not to be published under Circuit Rule 28.

2. In enforcing the Board's order, the Court's decision resolved several issues concerning the union-security obligations of union members who leave bargaining unit jobs for supervisory positions and later return to unit work as employees subject to a maintenance of membership clause. Thus, the Court affirmed:

(1) The Board's application of Section 2(3) and 2(11) to exclude supervisors from bargaining unit "employees" for union-security purposes; (2) the Board's *Idarado Mining* (77 NLRB 392) line of cases; and (3) the Board's factual determinations with respect to the Union's "honorary withdrawal" status. The Court also discussed, and found inapposite, the Sixth Circuit's ruling in *N. L. R. B.* v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (1973).

3. The issues dealt with in the "order" are plainly not "frivolous" or so insubstantial as to require no "explanation of the reasons for the action taken." Circuit Rule 28 (Guidelines for unpublished orders). Rather, the Court has recognized the substantial questions raised and has provided a full explanation of its reasons for affirming the Board's findings. On the surface, it may appear that the Court's decision has significance only for the parties immediately involved in the case. However, we believe that it would be of assistance to the labor relations community to have access to the Court's decision, and to guide their conduct accordingly. And, the Board is, of course, interested in disseminating the fact that the Court has approved the *Idarado Mining* principle, and has read the Sixth Circuit's *Industrial Towel* decision as not rejecting that principle.

4. For these reasons, the Court's enforcement ruling does involve issues "of continuing public interest" and constitutes "a significant and non-duplicative contribution" to the decisional law under the National Labor Relations Act, and thus should be published under Circuit Rule 28 (Guidelines for published opinions).

Wherefore, the Board respectfully requests that its motion be granted and that the Court's order of enforcement previously filed be issued as a published opinion.

/s/ ELLIOT MOORE
Elliot Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C. this 6th day of June, 1974.

JUL 31 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-2032

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND ILLINOIS BELL TELEPHONE COMPANY,
Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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111 West Jackson, Suite 2100,
Chicago, Illinois 60604,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-2032.

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet reported and is Appendix A to the petition. The decision of the National Labor Relations Board is reported at 200 NLRB No. 159 (Pet. App. C).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether the Board and the Court of Appeals abused their discretion in deciding that the Union's threats and its attempt to

cause the discharge of one employee who had not paid union dues violated the National Labor Relations Act (Section 8(b)(2) and 8(b)(1)(A)). That statute is quoted on page 4 of the petition.

STATEMENT OF THE CASE.

In March, 1968, Robert Galka left the Union and the bargaining unit to become a foreman. In February, 1969, he returned to the bargaining unit but he did not rejoin the Union until December, 1970, when he did so "under protest." Between June and December, 1970, the Union repeatedly threatened Galka and finally coerced him into joining. The Administrative Law Judge, the panel of the Labor Board (consisting of Chairman Miller and Members Jenkins and Penello), and Circuit Judges Kiley, Cummings and Sprecher all held that the threats and the coercion violated the Act. All of them found that the Union was not excused by the contract between the Union and the Company, or by any provision of the Union's internal documents.

Illinois Bell was made a party to the circuit court proceeding by an order of that court dated April 20, 1973, and is shown as such in the caption of that court's opinion (Pet. App. A). It is therefore a party in this Court under Rule 21, even though it is otherwise ignored in the petition.

ARGUMENT.

The facts of this case are clear, but the situation occurs very infrequently. Pages 8 and 18 of the petition unfairly accuse the Board of an "attempt to revive" a 1948 decision (the *Idarado* case in 77 NLRB) after a "retreat" which allowed it to be "dormant for many years." But there is nothing to show that the Board ever followed any different rule in the interim. A much more rational interpretation of this scanty history is that the Board simply had no need to apply the rule "for many years."

There is no substantial claim of any conflict of decisions, and the opinions below are plainly correct. The petition relies on *NLRB* v. *Industrial Towel Service*, 473 F. 2d 1258 (C. A. 6, 1973). But that case involved an absence caused by illness with different facts and documents which convinced the Sixth Circuit that the employee had never severed her connection with the bargaining unit. There is no way of knowing how the Sixth Circuit would have decided this case, particularly since it never even mentioned the *Idarado* case, which was relied on by the Board and the Seventh Circuit in this case.

The relief ordered by the Board was very minor, and the case simply does not deserve the time of this Court. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 491 (1951); *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962).

As the petition notes, the Seventh Circuit originally issued its order in this case under its Rule 28, which meant that it would not even be published. Pet. Apps. B, F. For reasons not specified, the court later granted the motion of the Deputy Associate General Counsel for the Board asking that the opinion recording his victory be published. But the mere fact that the opinion will be published by the Court of Appeals does not raise this trifling controversy to the level required for any action by this Court.

The petition should be denied.

Respectfully submitted,

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EDWARD W. BERGMANN,
Attorneys for Illinois Bell Telephone Company.

DONALD H. SHARP,
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Chicago, Illinois 60604,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2032

LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A, A1-A5) is not reported. The Board's decision and order (Pet. App. C, C1-C2) and the Trial Examiner's Decision, (Pet. App. C, C3-C20) are reported at 200 NLRB No. 159.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1974 (see Pet. 2). The petition for a writ of certiorari was filed on July 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by threatening, and attempting to cause, the discharge of an employee for non-payment of union dues at a time when the union could not lawfully compel him to make such payment as a condition of employment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 4.

STATEMENT

Illinois Bell Telephone Company[1] (the Company) provides telephone service in Decatur, Illinois (Pet. App. C, C4). For many years a contractual relationship has existed between the Company and petitioner Union. The relevant contract contains a maintenance-of-membership clause providing that all "employees" who become members of the Union "shall maintain their membership in the the Union in good standing as a condition of employment." The term "employee" is defined as an "employee * * * of the Company represented by the Union." (Pet. App. C, C5; G.C. Exh. 5, Art. I, Sec. 2, Art. II.)

Robert Galka first began working for the Company on September 1, 1959, as a frame man. He joined the Union in March 1960 (Pet. App. C, C5; Tr. 23).[2] On March 15,

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[1] Intervenor below.

[2] "Tr." refers to the transcript of the proceedings before the Administrative Law Judge; "G.C. Exh." refers to the General Counsel's Exhibits.

1968, Galka, then employed as a communications maintenance man, was promoted to station installation foreman, a supervisory position outside of the bargaining unit represented by the Union (Pet. App. C, C5; Tr. 23). In April 1968, Galka told Union steward Don Maddox that, "since I was in management and I wasn't in the Union anymore, that I would like to have my Union dues stopped." Galka did not sign a union withdrawal card, nor was such a card given to him but his dues were stopped; he stopped receiving union literature and, for the time, had no further contact with the Union (Pet. App. C, C6; Tr. 28-29).

In February 1969, Galka left his supervisory position and returned to a job within the bargining unit (Pet. App. C, C5; Tr. 24). In April, Union steward Jim Nalefskin told Galka that he had some cards for Galka to sign "in order * * * to get [Galka's] Union dues started again." Galka agreed but did not receive any cards or further communications from the Union (Pet. App. C, C6; Tr. 29-30).

Fourteen months later, in June 1970, Union steward Maddox told Galka that he was "in trouble" because he owed some "back dues." When Galka asked how he could owe any dues when he was not a member, Maddox replied that the Union had "automatically" reinstated him to membership when he returned to the bargaining unit in February 1969. Maddox told Galka to sign a payroll deduction card and the Union would bill him later for back dues. Galka replied that he would not sign anything under those circumstances. Maddox asked Galka if he "knew what this meant." Galka answered that he "didn't care what it meant." (Pet. App. C, C6; Tr. 30-31.)

On July 1, 1970, the Union, by letter, a copy of which was sent to Galka, requested the Company to discharge Galka if he refused to pay his back union dues immediately, pursuant to the "Union Security" provision of the collective bargaining agreement (Pet. App. C, C6-C7). Shortly afterwards, when Maddox asked Galka if he had received a copy of the letter, Galka stated that he had no objection to joining the Union. Maddox replied that that was not the issue, since Galka had automatically been carried as a member he was therefore obligated to pay back dues dating from his return to the bargaining unit. When Galka repeated that he did not owe any back dues, Maddox warned that Galka's "job was at stake and he would hate to see [Galka] lose [his] job for one hundred forty some dollars of back dues * * * " (Pet. App. C, C7; Tr. 32-33).

On July 30, 1970, the Company refused to comply with the Union's July 1 request to discharge Galka, stating that it would be "a violation of the National Labor Relations Act" to do so (Pet. App. C, C7-C8; Tr. 47-48). After several similar demands by the Union both to Galka and the Company (Pet. App. C, C8-C9; Tr. 24-25, 33-6, 49), Union attorney Robert Fitzgerald wrote Galka, stating that Galka was delinquent in his dues, from February 1969 to the present, and that the Union considered Galka to have been a member continuously from March 1960. The letter continued: "Unless you tender an amount of money equal to the dues owed or make mutually satisfactory arrangements for the payment thereof by December 11, 1970, I will be forced to take appropriate action on their behalf." (Pet. App. C, C9; Tr. 37.)

After conferring with the Company, Galka decided, in order to protect his job, to pay the back union dues and sign a payroll authorization card. On December 10, 1970, Galka met with Maddox; he signed a payroll deduction card and a check for $141.45, writing on the back of the check the words "paid under protest" (Pet. App. C, C9-C10; Tr. 40-42). Thereafter, the Company filed an unfair labor practice charge with the Board (Pet. App. C, C3).

The Board, adopting the findings of its Administrative Law Judge, concluded that, "when Galka left the bargaining unit in March 1968, to take a supervisory position with the Company, he did so with a *bona fide* intention of not returning, that his obligation to retain membership in the Union under the collective bargaining agreement ceased as of that time, and that, upon his return to his job within the bargaining unit in February 1969, he was in the position of a new employee, with no obligation under the contract to resume payment of union dues." Therefore, it held that in requesting the Company to discharge Galka because of his failure to tender union dues for which he was not obligated, the Union violated Section 8(b)(2) and (1)(A) of the Act. (Pet. App. C, C14.) The Board also found that the Union violated Section 8(b)(1)(A) by threatening Galka, through the letter of its agent, Fitzgerald, with discharge if he failed to pay union dues for which he was not obligated (Pet. App. C, C14-C15). The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practices found, to reimburse Galka for all union dues collected since December 10, 1970, and to advise the Company that no further dues deductions would be made from Galka's pay unless, and until, he executed a new payroll deduction card (Pet. App. C, C2, C17-C18).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A, A1-A5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Thus, no issue warranting further review is presented.

1. Section 8(b)(2) of the Act makes it unlawful for a union to cause, or attempt to cause, an employee's discharge for failure to pay dues or fees to the union, except where such obligation is sanctioned by a valid union security provision. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40. Under settled Board principles, an employee who terminates his relationship with an employer and is then rehired by him, or who transfers out of the bargaining unit and then returns to it, "stands in the same shoes as one being hired by the * * * Company for the first time, who has never been a member of the * * * Union" (*Convair*, 111 NLRB 1055, 1056) — insofar as application of a union security provision is concerned. See also *Kaiser Steel Corp.*, 125 NLRB 1039,1041; *Yellow Cab Co.*, 148 NLRB 620, 623-625. When Galka was elevated to the position of foreman, his status as an "employee" within the bargaining unit was terminated[3] just as it would have been had he left the Company and gone to work elsewhere. Therefore, the Board properly concluded that, when he rejoined the bargaining unit, he was entitled to a fresh choice, under the maintenance-of-membership clause of the contract (*supra*, p. 2), whether to rejoin the Union.

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[3] The contract defined "employee" as an "employee of the Company represented by the Union" (*supra*, p. 2). Section 2(3) of the Act excludes supervisors from the definition of "employee."

There is no substance to the Union's contention that the Board's decision allows an employee to "void the effect of valid internal Union rules concerning the retention of membership, by working as a supervisor and then returning to the bargaining unit" (Pet. 16). This contention is predicated on the Union's assertion, before the Board and the court below, that, although Galka had left the bargaining unit to become a supervisor, he remained subject to union membership obligations because he was put on "honorary withdrawal status." However, the Union's Constitution provides for two methods of conferring "honorary withdrawal status" on a member: by the issuance of an "honorary withdrawal" card, or by having a member "shown as on honorary withdrawal without actual issuance of the card" (Pet. App. D, D1-D2). The Board found, and the court below agreed, that Galka was neither issued an "honorary withdrawal" card, nor did the Union introduce any evidence to indicate that he was "shown on honorary withdrawal" (Pet. App. A, A4-A5; Pet. App. C, C11-C16).

2. Contrary to petitioner's contention (Pet. 8-12), the decision below does not conflict with *National Labor Relations Board* v. *Industrial Towel and Uniform Service*, 473 F. 2d 1258 (C.A. 6). In that case, employee Durham executed a check-off authorization that was self-renewing annually unless the signer took affirmative action. Durham left work in 1966 because of illness but returned in 1969, at which time the employer reinstated the dues checkoff without fresh authorization. The Sixth Circuit held that the Company did not act unlawfully. It found that the "unambiguous language" of the self-renewing checkoff was controlling, "since the parties were presumed to have known what

they were signing." *Id.* at 1260. Further, the court found that the circumstances surrounding Durham's leaving and re-employment indicated that neither the union nor the company treated her as a new employee. *Ibid.* In the instant case, there was no independent checkoff authorization. Moreover, when Galka left the bargaining unit for a supervisory position, he severed all connection with the Union (*supra,* p. 3). When he returned to the bargaining unit, the Company treated him as a new employee and the Union, except for an offer on which it did not follow through to bring him the cards necessary to "get [his] Union dues started again" (p. 3 *supra*), ignored him for 14 months and then sought to collect past dues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
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LAURA ROSS BLUMENFELD,
Attorney,
National Labor Relations Board.

SEPTEMBER 1974.

DOJ-1974-09